MOTION FILED

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No. 06-857

In The Supreme Court of the United States

BLACKWATER SECURITY CONSULTING, LLC, *et al.*,

Petitioners,

v.

RICHARD P. NORDAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMERICAN INTERNATIONAL GROUP, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, American International Group, Inc. (hereinafter "AIG") respectfully moves this Court for leave to file the annexed brief as *amicus curiae* in support of the Petition for a Writ of Certiorari of Petitioners Blackwater Security Consulting, LLC, *et al.* (hereinafter "Blackwater"). All parties have consented to the filing of the annexed brief except Respondent Richard P. Nordan ("Nordan"), who has declined to consent.

AIG writes a significant portion of the Federal Workers' Compensation coverage mandated by the Defense Base Act ("DBA"), 42 U.S.C. § 1651, *et seq.* This coverage protects American and foreign workers employed by private companies contracted by the United States government for overseas work relating to America's war, defense and reconstruction efforts in Iraq and Afghanistan. AIG's interests are those of the DBA insurance industry in being enabled to provide mandated cover for workers performing in the interests of the United States through utilization of private contractors in the war effort.

The decision of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit decision"), *In re Blackwater Security Consulting, LLC*, 460 F.3d 576 (4th Cir. 2006) (App. 1a-32a), which remands the determination of DBA coverage to a state court, is unprecedented and subversive of Congressional intent, and threatens the viability of the DBA underwriting industry's ability to provide cover and the ability of private contractors to provide workers to serve America's war, defense and reconstruction efforts. The uncertainty and conflict in DBA

administration and inconsistent state court rulings on the application and scope of DBA cover will wreak havoc on underwriters' ability to price DBA cover and anticipate costs and exposures. This uncertainty may lead to the reduction of DBA underwriters and a restriction of commitment to providing DBA cover. The resulting effects on the ability of the United States government to implement its policy through DBA contracts overseas are potentially great.

The uncertainty and conflict likely to develop as a consequence of the Fourth Circuit decision enabling, on remand, a state court determination of the DBA's jurisdiction may lead to a situation where United States foreign policy interests, inclusive of defense, intelligence and reconstruction, may not be capable of implementation through the use of private contractors. The lack of sufficient underwriting interests and capability, as well as increased costs attributable to uncertainty, may reduce the pool of contractors available for these American missions.

The number of employees, employers and contractors within DBA cover has increased tenfold in the last several years as the United States government and its instrumentalities have accelerated and expanded the utilization of private interests to further foreign policy objectives. Particularly as concerns military, security and intelligence objectives, it has become the stated policy of the United States to privatize a significant number of critical functions previously performed by government employees, including military personnel. Private commercial contractors under United States government contracts are now an essential element of this country's war fitting

capability and are included in operational plans and orders.

The Fourth Circuit's unprecedented decision to remand DBA cover issues to a state court subjects DBA employees, employers and contractors to the tort laws of every state. It thereby creates war risk liability exposure, an uninsurable risk. The overwhelming negative consequences of the decision are of greatest concern to AIG and the entire DBA underwriting and private contracting industries.

For the foregoing reasons, AIG respectfully requests that its motion to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*[1]

American International Group, Inc. ("AIG") writes a significant portion of the Federal Workers' Compensation coverage mandated by the Defense Base Act ("DBA"), 42 U.S.C. § 1651, *et seq*. This coverage protects American and foreign workers employed by private companies contracted by the United States government for overseas work relating to America's war, defense and reconstruction efforts in Iraq and Afghanistan. AIG's interests are those of the DBA insurance industry in being enabled to provide mandated cover for workers performing in the interests of the United States through utilization of private contractors in the war effort.

The decision of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit decision"), *In re Blackwater Security Consulting, LLC*, 460 F.3d 576 (4th Cir. 2006) (App. 1a-32a), which remands the determination of DBA coverage to a state court, is unprecedented and subversive of Congressional intent, and threatens the viability of the DBA underwriting industry's ability to provide cover and the ability of private contractors to provide workers to serve America's war, defense and reconstruction efforts. The uncertainty and conflict in DBA administration and inconsistent state court rulings on the application and scope of DBA cover will wreak havoc on underwriters' ability to price DBA cover and anticipate costs and exposures. This uncertainty may lead to the

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, *amicus curiae* states that no counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation or submission of this brief.

reduction of DBA underwriters and a restriction of commitment to providing DBA cover. The resulting effects on the ability of the United States government to implement its policy through DBA contracts overseas are potentially great.

The uncertainty and conflict likely to develop as a consequence of the Fourth Circuit decision enabling, on remand, a state court determination of the DBA's jurisdiction may lead to a situation where United States foreign policy interests, inclusive of defense, intelligence and reconstruction, may not be capable of implementation through the use of private contractors. The lack of sufficient underwriting interests and capability, as well as increased costs attributable to uncertainty, may reduce the pool of contractors available for these American missions.

The number of employees, employers and contractors within DBA cover has increased tenfold in the last several years as the United States government and its instrumentalities have accelerated and expanded the utilization of private interests to further foreign policy objectives. Particularly as concerns military, security and intelligence objectives, it has become the stated policy of the United States to privatize a significant number of critical functions previously performed by government employees, including military personnel. Private commercial contractors under United States government contracts are now an essential element of this country's war fitting capability and are included in operational plans and orders.

The Fourth Circuit's unprecedented decision to remand DBA cover issues to a state court subjects DBA

employees, employers and contractors to the tort laws of every state. It thereby creates war risk liability exposure, an uninsurable risk. The overwhelming negative consequences of the decision are of greatest concern to AIG and the entire DBA underwriting and private contracting industries.

STATEMENT OF THE CASE

For purposes of this brief *amicus curiae*, AIG adopts the detailed review and analysis set forth in the STATEMENT OF THE CASE section contained in the Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The Fourth Circuit's decision to remand DBA coverage issues to the North Carolina state court and thereby to subject a private military contractor to state tort laws is without support and in direct contravention of Congress' clearly-expressed intent in the DBA. Its effect is to reject Congress' mandate directing the United States Department of Labor ("Department of Labor") to, in the first instance, resolve questions of DBA cover, subject to review by the federal courts. Contrary to the express exclusive remedy provisions of the DBA, the decision creates war risk liability, an uninsurable risk.

Federal and state decisions have confirmed subject matter jurisdiction of DBA issues to be a federal question, not subject to state law. Moreover, the Fourth Circuit itself, in the instant decision and in previous decisions,

has held DBA cover to be exclusively a federal question not for state courts to resolve. The inclusion of private military contractors in the stated United States policy on war fitting capability further compels that DBA cover issues are federal and constitutional and not within any state's subject matter jurisdiction.

The Department of Labor has for the last 65 years, without exception, administratively handled all injury and death claims arising under the DBA. It has ruled on and is in the process of ruling on the DBA claims of Jerko Zovko ("Zovko"), Stephen Helvenston ("Helvenston"), Wesley Batalona ("Batalona") and Michael Teague ("Teague"). It has ordered DBA cover on the Zovko claim and made various rulings in support of DBA cover on the others. The Department of Labor has issued DBA cover orders on numerous other DBA claims filed by Blackwater's employees and contractors working under its military contracts with the United States government. It is fulfilling its Congressional mandate of addressing DBA cover in the first instance, and the Fourth Circuit's decision should not be allowed to subvert its actions.

ARGUMENT

I. The Questions Presented Are Important, and This Controversy Is an Appropriate Vehicle in Which to Resolve Them.

The Fourth Circuit decision creates the dire circumstance of empowering a state court with determining DBA cover in full contravention of Congress' intent and the mandate of this Court. If left standing, it would be the first known instance of remanding a battlefield contractor

tort lawsuit to a state court – whether before or after the political branches of the national government formalized the concept wherein military contractors are considered an integral component of our deployed "Total Force," serving alongside "active and reserve military components . . . in thousands of locations around the world, performing a vast array of duties to accomplish critical missions." Secretary of Defense, *Developing a 21st Century Total Force*, Quadrennial Defense Review Report at 75 (Feb. 6, 2006) (http://www.comw.org/qdr/qdr2006.pdf). *See generally* David C. Hammond, *Holding Battlefield Contractors Accountable: Federal 'Removal' Protects Federal Interests*, 21 Legal Backgrounder 13 (Washington Legal Foundation) (Apr. 7, 2006) (http://www.wlf.org/upload/040706LBHammond.pdf).

In the past year, even while the Executive Branch formalized the "Total Force" concept, at least six federal courts have either denied motions to remand tort lawsuits against battlefield contractors or have dismissed such cases based on the nonjusticiability of the tort allegations against each respective battlefield contractor. *Smith-Idol v. Halliburton*, No. H-06-1168, 2006 U.S. Dist. LEXIS 75574 (S.D. Tex. Oct. 11, 2006); *Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637 (S.D. Tex. 2006); *Woodson v. Halliburton Corp.*, No. H-06-2107, 2006 U.S. Dist. LEXIS 70311 (S.D. Tex. Sept. 28, 2006); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 U.S. Dist. LEXIS 61980 (S.D. Tex. Aug. 30, 2006); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006); *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189 (M.D. Fla. 2006) (relying heavily on *Grable & Sons Metal Prods., Inc. v. Da. ue Eng'g & Mfg.*, 545 U.S. 308 (2005)).

As explained below, the Petition for a Writ of Certiorari provides this Court an opportunity to resolve the

important issues presented for the sake of the United States, its DBA insurance providers, and its battlefield contractors who are required by federal law to maintain DBA insurance.

II. The Decision of the Fourth Circuit Improperly Grants to State Courts Subject Matter Jurisdiction to Decide Questions of DBA Coverage.

In the 65-year history of the DBA there has never been a federal judicial determination, such as the Fourth Circuit decision, suggesting that a state court has jurisdiction to determine the issue of DBA coverage. Never before has a federal court remanded to a state court the determination of DBA cover in the first instance. The consequences of allowing the Fourth Circuit decision to stand are far reaching to the private federal contractor and DBA underwriting industries. That decision rejects the comprehensive federal framework for the adjudication and administration of DBA claims, inclusive of the critical exclusive remedy provision of the DBA, subjecting a purely federal question to the tort laws of 50 states. The Fourth Circuit should have remanded the case to the district court with instructions to dismiss because, regardless of whether the district court had subject matter jurisdiction upon removal, and regardless of whether the Fourth Circuit had appellate jurisdiction under 28 U.S.C. § 1447(d) to review the district court's decision that it lacked subject matter jurisdiction, a federal court must dismiss rather than remand where, as here, the state court also lacks subject matter jurisdiction.

AIG agrees with the Petitioners that, whether it is called the doctrine of derivative jurisdiction or otherwise, the correct procedural course where a district court lacks

subject matter jurisdiction over a removed case, and the state court also lacks subject matter jurisdiction, is to dismiss rather than to remand the case. Here the state court lacks subject matter jurisdiction to decide whether the DBA applies and provides the exclusive remedy, *see* 42 U.S.C. § 1651(c), because Congress committed DBA coverage decisions to the Department of Labor subject only to judicial review by federal courts.

There is no support in federal or state law for remanding a DBA coverage determination to a state court. Numerous federal courts have confirmed the exclusivity of an employee's remedies under the DBA to be solely statutory DBA benefits. *Nauert v. Ace Prop. & Cas. Ins. Co.*, No. 04-CV-02547, 2005 U.S. Dist. LEXIS 34497 (D. Colo. Aug. 27, 2005) (dismissing plaintiff's state insurance law bad faith claim based on DBA preemption); *Ross v. DynCorp*, 362 F. Supp. 2d 344 (D.D.C. 2005) (granting defendants summary judgment on plaintiffs' wrongful death and survivorship claims); *Schmidt v. Northrop Grumman Sys., Corp.*, No. 3:04-CV-042, 2005 U.S. Dist. LEXIS 24688 (N.D. Ga. Mar. 4, 2005) (dismissing plaintiffs' wrongful death claims based on the exclusive remedy afforded by the DBA).

Several state supreme courts have similarly acknowledged that their lower state courts lacked subject matter jurisdiction over DBA matters. *Huhn v. Foley Bros., Inc.*, 22 N.W.2d 3 (Minn. 1946); *State ex rel. Haddock Eng'rs, Ltd. v. Swope*, 251 P.2d 266 (N.M. 1952).

The Fourth Circuit in its decision remanding the DBA cover issue to the North Carolina state court acknowledged that it is federal agencies and courts that have DBA subject matter jurisdiction. It succinctly stated that "federal district courts, followed by the federal courts of

appeals and the United States Supreme Court, review DBA claims after they have been initially adjudicated in the Department of Labor." *In re Blackwater*, 460 F.3d at 582 n.2, 591 n.9 (citing, *inter alia*, *Lee v. Boeing Co.*, 123 F.3d 801 (4th Cir. 1997)).

In fact, the Fourth Circuit had previously acknowledged the unique federal involvement in the determination and scope of DBA jurisdiction. In *Shives v. CSX Transportation, Inc.*, 151 F.3d 164 (4th Cir. 1998), the court held "the question of whether the LHWCA applies to a work related injury is exclusively a federal question which Congress never intended for state courts to resolve." *Id.* at 167. Underlying the court's ruling was its acknowledgement that Shives would then proceed "through the administrative process before the Department of Labor with his protectively filed LHWCA claim." *Id.* at 171.

Further, the Fourth Circuit's decision not to recognize the already existing "constitutional questions" exception to 28 U.S.C. § 1447(d) conflicts with *Johnson v. Robison*, 415 U.S. 361, 366 (1974), in which this Court rejected a "contention that [38 U.S.C.] § 211(a) [which prohibits judicial review of decisions of the Veterans' Administrator] bars federal courts from deciding the constitutionality of veterans' benefits legislation." This Court explained that such a construction of a legislative bar to judicial review "would, of course, raise serious questions concerning the constitutionality of § 211(a), and in such case 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question[s] may be avoided.'" *Id.* at 366-67 (footnote and internal citation omitted).

III. The Decision of the Fourth Circuit Conflicts with Both Congressional Intent and the Mandate of This Court that the Department of Labor Should Determine DBA Coverage in the First Instance.

The private federal contractor and DBA underwriting industries rely on the uniform and informed administration of the DBA that the Department of Labor provides today and has provided for the last 65 years. In performing its Congressionally-mandated responsibilities, the Department of Labor enables DBA underwriters to provide the critical cover of workers performing in the interests of the United States through its overseas contracts. The exclusivity provision of the DBA expressly voids concurrent jurisdiction with any state as to the compensation obligations of a DBA employer, and further makes clear that, statutorily, a state court or agency is prevented from involvement in the determination and scope of DBA jurisdiction. 42 U.S.C. § 1651(c). That the DBA provides a thorough framework for adjudication and administration solely under federal, and not state, review is also made clear by the statute's claim filing provisions, 33 U.S.C. § 913(a), notice, investigation and hearing provisions, 33 U.S.C. § 919, and jurisdiction-vesting provisions, 33 U.S.C. § 939(a).

There have been over 5,000 claims filed for injury and death under the DBA since the inception of the Iraq and Afghanistan wars. The Department of Labor has administratively handled each and every one of these claims and has made rulings as to cover in the first instance. In no claim has a state court had any involvement whatsoever in the determination of DBA cover. Rather, such issues have been solely determined by federal agencies and courts.

In fact, Blackwater itself has had 152 claims for injury and death filed in the Department of Labor by its workers. This number includes the claims of Zovko, Helvenston, Batalona and Teague. In every one of these cases, DBA benefits have been paid by and on behalf of Blackwater and accepted by the claimants with the approval and acknowledgement of the Department of Labor.

The Department of Labor has issued compensation orders and awards in nine of the death claims filed on behalf of Blackwater workers, including Zovko. In so doing, the Department of Labor has accepted the Blackwater security contracts to be within DBA cover.

In addition to the Department of Labor's finding of DBA cover in the Zovko claim, the Department of Labor has addressed, and continues to address, the issue of DBA cover and the issuance of compensation orders in the DBA claims of Teague, Helvenston and Batalona.

In his July 24, 2006 Order of Remand in the matter of Rhonda Teague (Widow) v. Blackwater Security Consulting, LLC, *et al.*, No. 2006-LDA-16, Administrative Law Judge ("ALJ") Richard D. Mills found that, "Employer [Blackwater] is correct in arguing that since no issues are at issue and since all benefits owed have been paid and are still being paid to Claimant [Rhonda Teague, widow of Michael Teague], I agree with Employee's position that under the circumstances of this case, the notifying of the [district] director of the withdrawal of controversion is mandatory." *Teague*, No. 2006-LDA-00016 (July 24, 2006) (ALJ). ALJ Mills concluded, "the district director shall then proceed to dispose of the case." In the Brandon Teague claim, the Department of Labor, through its District Director, has issued a memorandum directing

DBA benefits to continue to be made, and in the Rhonda Teague DBA claim has issued a memorandum affirming the payment of benefits and a prior recommendation of DBA cover.

The DBA claims of Helvenston and Batalona are currently before the Benefits Review Board ("BRB") of the Department of Labor. In these two consolidated matters, ALJ William Dorsey has issued a number of orders relating to DBA coverage for both Helvenston and/or Batalona, including:

- a December 28, 2005 Order, *Irby (Helvenston) & Batalona*, Nos. 2006-LDA-00015, 2006-LDA-00017 (Dec. 28, 2005) (ALJ), in which ALJ Dorsey observed that, "[i]f it applies, the [Defense Base] Act is the exclusive remedy for the decedent's survivors," citing 42 U.S.C. § 1651(c);

- a February 6, 2006, Order, *Irby (Helvenston) & Batalona*, Nos. 2006-LDA-00015, 2006-LDA-00017 (Feb. 6, 2006) (ALJ), in which Judge Dorsey wrote, "The Fourth Circuit's decision about which trial court will entertain the wrongful death action has no effect on the coverage issue. This is the appropriate forum to determine disputes about whether the decedent was:

  - an 'employee' as the Act uses the term in 42 U.S.C.A. § 1651(a), and (or)

  - engaged in activities the Act covered when he died. *See* 42 U.S.C.A. § 1651(a)(1) to (6)"; and

- a March 23, 2006, Order, *Irby (Helvenston) & Batalona*, Nos. 2006-LDA-00015, 2006-LDA-00017 (Mar. 23, 2006) (ALJ), after an initial round of discovery, in which Judge Dorsey observed "that

> coverage under the [Defense Base] Act has been conclusively established by the admissions the Claimant[s] sought."

Finally, the Fourth Circuit decision conflicts with the doctrine of primary jurisdiction pending determination of DBA cover by the Department of Labor. In *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956), this Court reversed the lower court's decision and in a detailed analysis set forth that in relevant circumstances "the judicial process is suspended pending referral of such issues to the administrative body for its views."

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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